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THE CASE OF THE PAPERS

THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS, by Sanford J. Ungar. E. P. Dutton. 319 pp. \$7.95.

reviewed by Arthur S. Miller

If anyone still believes that the Supreme Court's decision in the Pentagon Papers case was a resounding victory for the press, he had better think again. Even better, he should read Sanford Ungar's *The Papers & The Papers*. Ungar, a reporter for *The Washington Post*, has written the first complete account of the struggle to publish the study, commissioned by Robert McNamara, of that dismal swamp of ill-conceived and misbegotten American policy, the Vietnam "war."

True, *The New York Times* and *The Post* did win—surely better than losing. But the victory came at the highest price yet paid in defense of the First Amendment. For the first time in American history, a prior restraint on publication was laid upon newspapers by court injunctions. That, as Ungar says, is a "rather hollow victory," a judgment concurred in by a high Justice Department official who is quoted as saying, "We proved one thing emphatically, that there can be prior restraint of publication while a case is being reviewed in the courts." So the hosannas should be muted, particularly with the addition of Lewis Powell and William Rehnquist to the Supreme Court.

Were that all to the case of the Pentagon Papers, it would hardly de-

serve book-length treatment. But this well written and essentially fair-minded account of the imbroglio points up other deeply important and, at times, disturbing matters. There is much fodder for reflective thought here; to me, the real value of the book lies in what it suggests rather than in what it details. An illustrative listing will have to suffice:

SELECTIVE ENFORCEMENT OF THE LAW. Was it merely fortuitous that the Government sued only those four newspapers that had been critical of the Administration? That would strain credulity to the breaking point. Other newspapers, including *The Los Angeles Times* (essentially a pro-Nixon organ), printed the Papers. Add the strict hands-off attitude toward Jack Anderson's revelations and it is difficult not to conclude that the Justice Department used law for political ends. If that is at least partially accurate, as I think it is, it presents a nasty picture of a "law-and-order" Administration.

THE SECURITY PHOBIA OF GOVERNMENT. Without doubt, much of the material in the Papers was absurdly over-classified. Classification helps to insulate the bureaucracy from revealing mountains of data to which the people are clearly entitled. Without access to information, there can be little or no public accountability for decisions taken. (For that matter, it is noteworthy that rather than being held strictly to account for errors of omission and commission, those who immersed the United States into Vietnam have usually been rewarded by "the system" with lucrative or prestigious jobs out of government—an interesting commentary on the

state of the union today. Ungar quotes William Florence, former Air Force security expert, as saying that more than ninety-nine and a half percent of documents classified on national security reasons could be disclosed without being "prejudicial to the defense interests of the nation." Surely it would be difficult to prove that publication of the Papers has in fact harmed the nation.

THE POSTURE OF THE LAWYERS. After the dust had settled from the case, both *The Times* and *The Post* fired their lawyers. And well they should have. Both firms seemed to act more like counsel for the Government than for the newspapers. At eleven the night before the first appearance in court, *The Times'* lawyers quit the case, necessitating frantic efforts to recruit replacements (who had to appear in court with little preparation). That is odd legal behavior, to say the least. As for *The Post*, one Roger Clark, a member of the firm formerly headed by Secretary of State William Rogers, seemed to be more interested in suppressing publication than in finding ways to justify it. Further, according to Ungar, *The Times* paid out \$150,000 in legal fees—a sobering lesson in the cost of litigation. Defense of the First Amendment is expensive.

THE SUPREME COURT. Each of the justices found it desirable to write an opinion. Some, particularly Chief Justice Warren Burger and Justice Harry Blackmun, went out of their way to discuss matters not relevant to the decision. They, with Justice Byron White, all but invited the Justice Department to file criminal charges. Burger (and others) were bitter about the haste in which the decision was rendered (something that didn't trouble them at other times—for example, the *Amchitka* bomb-test case). But then, serious students of the Court know that the justices view consistency as a convenience rather than a necessity.

THE RESPONSIBILITY OF THE PRESS. The analogue to selective enforcement of the law is selective printing of news matter. Ungar relates how *The Post* failed to publish clearly newsworthy material, once when Burger met two *Post* reporters at his home (at about

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